United Nations A/C.3/60/7

General Assembly

Distr.: General
3 November 2005

Original: English

Sixtieth session
Third Committee
Agenda item 71 (c)
Human rights questions: human rights situations and reports of special rapporteurs and representatives

Letter dated 2 November 2005 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General

Enclosed please find Israel's response to the report submitted by John Duggard, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1993/2A (A/60/271), which Israel views with concern (see annex).

I would be grateful if you could arrange for the present letter and its annex to be circulated as a document of the Third Committee, under agenda item 71 (c).

(*Signed*) Ambassador Dan **Gillerman**
Permanent Representative

05-58826 (E) 091105

Annex to the letter dated 2 November 2005 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General

Response of Israel to the report submitted by John Dugard, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1993/2A

General

Israel has emphasized for over a decade the problematic nature of the mandate of the Special Rapporteur, a mandate that only examines one side of the conflict, as admitted also by the Rapporteur. It is a mandate that prejudges key issues and a mandate that is unique and extreme in comparison with the wide range of regional and thematic rapporteurs working on the range of issues of international concern, a mandate that is in direct contrast to the current wave of reforms at the United Nations.

Israel is compelled once again to respond to the latest report of the Special Rapporteur. Regrettably this report, like its predecessors, is characterized by errors of omission as well as distortions of both fact and law, while advancing a one-sided political agenda.

This approach is all the more disappointing and unfortunate at the current time when, following the implementation of Israel's disengagement initiative, there is a unique opportunity for regenerating dialogue and cooperation between Israelis and Palestinians and reaching a negotiated solution to the issues in conflict. The report does not contribute to the prospect of such dialogue, but regrettably sets itself in opposition to the framework agreed by the parties and the international community for resolving the conflict.

The report fails to accurately represent a number of factual and legal realities, despite having been shown to be unfounded in Israel's previous responses. Israel will not reiterate these corrections (some for the third or fourth time), but instead refers to its responses to the previous reports of the Special Rapporteur.

Finally, in these introductory comments, a word must be said about the terminology used in the report, which, like previous reports of the Special Rapporteur, adopts prejudicial and partisan language. The report admits, for example, that the terms 'barrier' and 'fence' are "more neutral terms" but persists in using the term "Wall." Similarly, it insists on describing the

"green line" as the "internationally accepted border between Israel and the West Bank," even though this line has never been accepted as an international boundary, and Security Council resolutions 242 and 338, as well as the Quartet-sponsored Road Map, require that secure and recognized boundaries be determined through negotiations. Even more troubling is that, while the report admits that attacks against Israelis continued during the reporting period (the report itself refers to suicide bombings in Tel Aviv and Netanya and over 200 Palestinian attacks), it refuses to categorize these as acts of terrorism. ***The only time the words "terror" or "terrorize" appear in the report is - twice – in relation to the alleged intimidation of Palestinians by Israelis***. The logic by which the terminology of terrorism is deemed appropriate for allegations of intimidation by Israelis, but not suicide bombings by Palestinians, is quite simply unfathomable.

Israel's Disengagement Initiative

The current report was prepared prior to the implementation of Israel's disengagement from the Gaza Strip and from four settlements in the West Bank. In hindsight, it is apparent that the alarming predictions of the report were misplaced. Among the unfounded prophesies of doom were the following:

- Contrary to the report's insistence that "settlers have confronted the IDF in a violent manner... and it seems that this withdrawal is destined to be accompanied by further violence," the disengagement was implemented with restraint and without casualties.

- The report's prediction of "major disruptions to road traffic and freedom of movement [with] serious implications for the provisions of foodstuffs, access to hospitals, schools and places of employment" as well as a "humanitarian disaster" did not come to pass, as a result of the care and attention given to these issues by the Israeli authorities in cooperation with the representatives of the international organizations present at place.

- Alarming allegations that "insufficient account has been taken of unexploded ordnance and landmines, and the presence of asbestos material in the settlement houses scheduled for destruction," also proved unfounded. Ordnance and explosives were handled responsibly, and Israel carefully removed all hazardous materials from houses prior to their demolition.

Regarding the status of the Gaza Strip following the disengagement, the report reiterates the assertion made in previous reports that "it seems clear that Gaza will remain occupied territory." The factual basis for this confident assertion is unclear, particularly since the report professes that "there is no clarity in respect of Israel's plans or intentions for the future of Gaza." To prop up its conclusion, the report relies primarily on an assortment of rumours and conjectures, with little or no factual support ("It seems…" "There is also a suggestion…" "It is highly possible…" etc., etc.).

Beyond the dubious methodology of relying on vague and unattributed allegations, the specific charges themselves in fact do little to support the report's thesis. Many of the charges (such as a rumoured plan to construct a "concrete barrier in the sea between Israel and Gaza") have no connection to the question of whether the Gaza Strip can be considered occupied, while others are clear misrepresentations. For example, the assertion that Israel has announced it "will not hesitate to intervene militarily in Gaza after the withdrawal of settlers if Israel's security so requires" is a misreading of Israel's statement that it reserves the right to act in self-defense. Israel's statement expressly limits its right to engage in military activity in the area to the fundamental right of self-defense available to any state in relation to attacks emanating from neighboring territory. Indeed, this stipulation in the disengagement plan, together with the dismantling of the Military Government, serves as clear evidence that Israel has relinquished any power or authority for its forces to enter or operate in Gaza territory "at will."

As legal support for his assertion that Gaza remains occupied territory, the Rapporteur relies once again on the Nuremberg Tribunal *Hostages Case* as authority that, even in the absence of actual control, the potential to exercise control is sufficient to establish a state of occupation. Israel has addressed the misleading presentation of this case and the refusal to recognize any distinction between rogue partisan groups and an established and recognized Palestinian administration, in its responses to the Rapporteur's previous reports.

In the context of the current report, Israel will simply note the misleading manner in which the case is quoted. The report cites it as stating the following: "it was not necessary for the occupying Power to occupy the whole territory so long as it 'could at any time (it) desired assume physical control of any part of the country'".

In fact the relevant section of the case reads as follows:

> It is clear that the German Armed Forces were able to maintain control of Greece and Yugoslavia **until they evacuated them** in the fall of 1944. While it is true that the partisans were able to control sections of these countries at various times, it is established that the Germans could at any time they desired assume physical control of any part of the country. The control of the resistance forces **was temporary only** and not such as would deprive the German Armed Forces of its status of an occupant.
>
> Seen in context, it is evident that the Rapporteur's quotation from the case omits two elements particularly relevant to Israel's disengagement from Gaza: the fact that the ***occupying forces had not evacuated the territories***, and the fact that the ***control of the local forces was only temporary***. On the contrary, Israel evacuated the Gaza Strip of all forces and civilians, and the assumption of Palestinian control in the Gaza strip is not temporary; indeed Israel has specifically stated that it has no further territorial claims in these areas.

The Security Fence

The same lack of stringency apparent in the report's treatment of the Disengagement initiative is evident in its treatment of the security fence. Faced with the significant changes to the route of the fence, in accordance with the decisions of Israel's High Court of Justice, the Rapporteur concedes that the route has been "marginally modified." This can only be considered an extreme case of understatement, as is evidenced by his own statistics: In the addendum to his report of 8 September 2003 (E/CN.4/2004/6) the Rapporteur cited figures suggesting that 280,000 Palestinians would be included within the route of the fence. In the current report he gives the figure of 49,000 Palestinians. In other words, ***according to his own calculation, there has been a reduction of over 80 per cent in the number of Palestinians included within the route of the fence.***

The Special Rapporteur relies on alleged facts and realities while lacking a mechanism of verification. Israel's Supreme Court specifically referred to this oversight in its recent decision, Mara'abe v. the Prime Minister of Israel. The Supreme Court found that the difference between the ICJ ruling and that of Israel's Supreme Court was the factual basis laid before them. The Supreme Court brings one clear example:

> The ICJ quotes the Dugard report, according to which [Qalqilya] is sealed off on all sides. Residents are allowed to exit and enter though one military gate which is open from 7am to 7pm. This conclusion contradicts the Secretary-General's written statement, according to which there is not checkpoint at the entrance to the city. (HCJ Mara'abe case, para. 67)

The Supreme Court also notes the total absence in both the report of the Special Rapporteur and the decision of the ICJ of any data concerning Israel's security and military considerations. For example, in relation to Qalqilya, the Supreme Court notes:

> It was not mentioned that Qalqilya lies two kilometers from the Israeli city of Kfar Saba; that Qalqilya served as a passage point to Israel for suicide bomber terrorists, primarily in the years 2002-2003, for the purpose of committing terrorist attacks inside Israel; that the majority of the fence route on the western side of the city runs on the Green Line, and part of it even within Israel; and that since the fence around Qalqilya was built terrorist infiltration in that area have ceased. (*ibid.*, para. 68)

The Rapporteur vs. the peace process

The international community has made it clear that the best, if not only, hope of arriving at a resolution of the conflict is through the process set out in the Road Map. This plan, proposed by the Quartet consisting of the United States, the Russian Federation, the European Union and the United Nations, has been accepted by the Israeli and Palestinian leadership, and adopted by the Security Council. However, the Rapporteur repeatedly dismisses the delicate process painstakingly crafted in this document.

This is particularly evident in the Rapporteur's attitude to the issue of settlements. This issue has been agreed by the parties to be one of the subjects that must be addressed in permanent status negotiations. According to the Road Map, these talks can only take place after a number of preliminary steps have occurred – including concerted Palestinian action to dismantle the terrorist infrastructure and prevent indoctrination and incitement.

For the Rapporteur, however, such Palestinian actions are irrelevant. "There can ... be no justification for the retention of settlements", he asserts, irrespective of any violence or failure to act on the Palestinian side.

Similarly, the issue of Jerusalem is agreed by the two sides to be resolved through negotiations. Israel has already proven its willingness to make far-reaching proposals on this subject. But for the report, it seems Jerusalem is not an issue to be negotiated, but rather one for Israel to concede unilaterally before negotiations can take place.

The report applies a similarly problematic standard to the subject of final status negotiations. In the careful phased approach set out in the Road Map, these negotiations are supposed to commence during the third phase, following completion of initial commitments, including the dismantling of the terrorist infrastructure. Ignoring this framework, the report calls the international community to ensure that "such negotiations commence forthwith."

The report does more than dismiss the internationally accepted Road Map. It argues that the Road Map process counters international law, suggesting, "the Quartet and the road map process to which it is committed are not premised on the rule of law or respect for human rights." In so doing, the report distances itself from the efforts of the parties and the international community in its search for a realistic solution to the conflict.

Moreover, the Special Rapporteur undermines in his statements the accepted notion of the two-state solution, which lies at the heart of the Road Map and every international effort to resolve the conflict. As the Rapporteur has stated, "the two-state solution ... becoming increasingly difficult, if not impossible, [and] consideration should be given to the establishment of a binational Palestinian State [sic]." It is understood that a "binational Palestinian State" would lead to the dissolution of the State of Israel. That the Special Rapporteur would favour the Palestinian right to self-determination, as in previous reports, and in this instance dismiss the Jewish right to self-determination, contradicts the internationally accepted approach to solving the conflict.

Conclusion

Israel has long argued that the reports of the Special Rapporteur are a disservice to his role. Beyond the problematic nature of his one-sided mandate, the report reflects gross oversight of the facts, according to which rumours, however fanciful or unsubstantiated, may gain credence should they agree with the predispositions of the report.

But the current report, perhaps more than any other prior report, reveals the degree to which its premise and conclusions contradict the basic principles agreed by both sides and the international community, as the only basis for moving toward peace and reconciliation. Those committed to working for

peace accept that the Road Map is the only viable way forward; for the Rapporteur this mechanism instead represents a violation of international law. Those working for peace accept that the only lasting solution is two states; for the Rapporteur, on the contrary, this seems no longer possible or desirable. Those working for peace accept that progress must be built on the fulfillment of obligations by both sides; the report reflects Palestinian rights and Israeli obligations. There is little hope that such a perspective could improve the humanitarian situation in the region or bring the two sides closer to a resolution of the conflict.

The time has come to have a balanced mandate that treats both sides in a fair manner.